UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 11 Cr. 1091 (VM)

PETER LESNIEWSKI,
MARIE BARAN,
JOSEPH RUTIGLIANO,
STEVEN GAGLIANO,

Defendants.

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June 7, 2013
2:10 p.m.

Before:

HON. VICTOR MARRERO

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: JUSTIN S. WEDDLE
NICOLE W. FRIEDLANDER
DANIEL B. TEHRANI
Assistant United States Attorneys

DURKIN & ROBERTS
Attorneys for Defendant Lesniewski
BY: THOMAS A. DURKIN

KOEHLER & ISAACS, LLP
Attorneys for Defendant Baran
BY: JOEY JACKSON

JOSEPH W. RYAN, JR.
Attorney for Defendant Rutigliano

STEPHEN P. SCARING
Attorney for Defendant Gagliano

(In open court)

THE COURT: Good afternoon. This is a proceeding in the matter of United States v. Lesniewski, docket number 11 Cr. 1091.

Counsel, please enter your appearances for the record.

MR. WEDDLE: Justin Weddle for the government. I am here with Nicole Friedlander and Daniel Tehrani.

MR. DURKIN: Tom Durkin on behalf of the defendant Peter Lesniewski who is present.

MR. JACKSON: Joey Jackson of Koehler & Isaacs for Marie Baran, who is sitting to my left.

MR. RYAN: Joe Ryan for Joey Rutigliano.

MR. SCARING: Stephen Scaring for Mr. Gagliano.

THE COURT: The Court has scheduled this conference of some months ago as the final pretrial conference in this matter, which is scheduled to proceed to trial in roughly one month.

Mr. Weddle, would you bring the court up-to-date on the status of the matter insofar as preparation for trial and any possibility of any further dispositions short of trial?

MR. DURKIN: If I could, I have a matter I would like to raise before we begin.

THE COURT: Is it a matter of such urgency that needs to be raised at this time?

MR. DURKIN: I think so. I can wait for Mr. Weddle.

There is something of concern that we have that I would like to raise as soon as possible.

THE COURT: Is the government aware of whatever it is that you have to raise?

MR. DURKIN: No.

THE COURT: Mr. Weddle.

MR. WEDDLE: There is some suspense there, your Honor.

I think we are on track for our July 15 trial from the government's point of view. We obtained the superseding indictment in the beginning of May, which is denoted S14. So that indictment does what we discussed after the February trial, or at the time of the February trial was adjourned, that is, it puts these four defendants together in a single trial.

We have been obviously making discovery from the beginning, from the time that this case began. We have made extensive discovery. And as we collect material and as we prepare for trial and find things that may have slipped through the cracks, we are continuing to produce those things as promptly as we can.

Our prediction for the trial is still that it's about a four-week trial, your Honor. We currently count about 25 witnesses. That's not counting custodial witnesses and witnesses on relatively technical matters like venue. We have had some discussion with defense counsel about stipulations that would cover those matters, and defense counsel have

been -- I don't want to overstate it, but they have not been dismissive. They have been somewhat receptive to the idea of a stipulation, but they wanted to see the written stipulation. So we are in the process of drafting those up and that should help keep the trial to the length that I have described.

Among the witnesses, we have a number of cooperators, as your Honor is aware. So every cooperator tends to take a significant amount of time at a trial. I estimate eight or so cooperator type witnesses, one expert witness, and then a number of other witnesses, including summary witnesses who are going to talk about pattern evidence that we have briefed before and things that like.

So that's kind of the outline of the trial. We are on track for making disclosures on the timeline that was previously ordered by the Court with respect to the February trial. That is, we have made expert disclosure. We have supplemented it I believe two times. We are going to continue to supplement it as necessary. The expert disclosure relates to this medical doctor, @Dr. Baron.

We are looking forward to a few deadlines coming up. 30 days prior to trial we plan to make in limine motions, which would include our 404(b) type notice, and we have in mind a number of other motions that would go into in limine motions, which I can preview for your Honor. We plan to produce a witness list at that time. I think our further deadlines are

two weeks before trial to produce an exhibit list, and I anticipate we will be producing the exhibits themselves at the same time. And two weeks before trial producing 3500 material.

We have already produced a large number of interview memos in the course of discovery. So some of the 3500 material may be duplicative, but we plan to put together the 3500 material and probably some other interview memos for non-testifying people two weeks before trial.

We are also looking forward to reverse disclosure, that is disclosure by the defense to the government. We received some documentary discovery from Steven Gagliano months ago, but have received no Rule 16 discovery from any other defendant. I assume and I hope that as they now are getting close to the trial date, they are forming intentions to introduce their own documents and things at the trial, and to the extent they are forming those intentions, Rule 16 requires them to turn that material over. So we hope that they will do that and comply with the rule.

Their deadline for expert disclosure is 30 days before trial. As I have said, we have disclosed our expert notice on time and then supplemented it. We have also disclosed the actual names of the particular files that our expert, our medical doctor -- I'm sorry. If I could withdraw that. We had an agreement with one defendant to make some additional disclosure relating to the expert, and we have done that, but

it only applies to one defendant. So let me just withdraw that.

So the defense expert disclosure, to the extent they intend to call any experts, is 30 days before trial. So we are looking forward to that as well.

I don't know what Mr. Durkin's issue is going to be that he is going to raise.

I guess the final thing I would typically do at a final pretrial conference is to discuss pleas, and your Honor inquired about the possibility of resolution. Our office's policy, as we have notified the defendants, is we only make plea offers in writing. So typically at a final pretrial conference we would set forth on the record the dates of written plea offers that we have made so that the record is clear, in light of the Lafler and Frye cases, what the plea offers have been and that the defendants themselves know that there have or have not been plea offers.

We have obviously discussed the possibility of resolution with each defense counsel here and have been told that no defendant has any real interest in a resolution short of trial. So unless there is some interest from a defendant, we don't normally formulate a plea offer, and we have not made any plea offers with respect to these defendants.

THE COURT: Thank you.

Before turning the floor over to Mr. Durkin, let me

respond to a couple of points to what Mr. Weddle has indicated concerning the schedule and the procedures.

Bear in mind that if we begin this trial in the middle of July, July 15, and according to the government it may go at least four weeks, I assume, Mr. Weddle, when you said four weeks, is that for the government's case or does that contemplate the defense as well?

MR. WEDDLE: That's for the government's case. We try to make an estimate about cross-examination and things like that, but that's really the government's case. Obviously, your Honor, as we get closer to trial, we hope very much to streamline the case as much as possible.

THE COURT: It is that streamline theme that I wanted to emphasize at this point.

If the government's projection bears out and we are four weeks into this case, it's going to be into the middle of August, and I know that some of you may be at that point getting somewhat antsy about vacation schedules and other commitments. So it would be very critical, or it is very critical for us to do everything conceivable to make sure that we remain within the time frame that will allow us to conclude the trial by the scheduled time of the middle of August.

To that end, there are some things I would urge and almost insist that the parties do. Mr. Weddle may do at least one of them, which is endeavoring to limit the witnesses who

are not necessary to testify to substantive matters. If you have witnesses whose sole purpose is to authenticate documents or dates or matters that don't go to substance, I would ask the parties to stipulate to those facts and circumstances so that we don't need to have live witnesses brought for those purposes. It takes much more time to do that than to read a simple stipulation into the record on such matters as document authentication, etc.

Second, this is very crucial, as to exhibits, it is the Court's practice at trial to ask the parties to review all documents that are proposed to be introduced at the trial and to identify in bulk those as to which there is no objection or reason for objection, and those are then identified in the record early on en masse. In other words, the government will read the list of those documents that it seeks to introduce as to which there is no objection from any defendant. During the course of the trial, then we don't need to have specific individual introduction of those documents. The government simply puts them in and there will have been a record that those are accepted without objection. If there are objections as to other documents, we will deal with the objections separately as those documents are introduced. That procedure is intended to and, in this Court's experience, saves an enormous amount of time because it does not require an individual introduction of documents and then an individual

determination or demonstration by each defendant as to whether or not there are objections to the documents.

So pay careful attention to those two guidelines, and we should be able to save tremendous amounts of time if they are complied with.

All right. If there is nothing else from the government, Mr. Durkin, you asked for the floor.

MR. DURKIN: Thank you, Judge.

Judge, the issue I want to raise, I just mentioned in passing. I did not raise it with the government because I did not expect them to entertain any agreement. The issue I want to raise with you, and I raise this delicately and respectfully, and I wanted to raise it orally first, because you don't know me and I don't know you, but it's an issue regarding disqualification that I don't normally make lightly, I would never make lightly, and I am certainly not making it lightly in this case, but I thought it best if I raised it orally first.

My client is concerned, and I think with some justification, that there is at least an appearance that the Court cannot be impartial based on its statements that it made in the public filing that it did, docket number 399, when it filed a record after the Ajemian sentencing.

THE COURT: Mr. Durkin, let me see if we can cut this short. Whatever the Court said pertained to Mr. Ajemian and

his circumstances, his record, his involvement in the conspiracy, and nothing else and no one else.

MR. DURKIN: That's the problem I have, if I could just raise it. I don't want to be combative or argumentative. I have great respect for you, and I don't make this presentation lightly.

THE COURT: The other thing, Mr. Durkin, is you're kind of prejudging your own client's circumstance. How do you know he is going to be found guilty?

MR. DURKIN: If I could just explain to you what I am concerned about.

I was concerned about the fact that this was filed of record to begin with, which is not critically important. There are two portions of the statement that concern us greatly. The first is that in the very beginning of your statement you suggest that: "This proceeding presents an illustration of the staggering harm the criminal mind can bring about by means of another device not ordinarily perceived as meant for breaking the law: The stethoscope."

Then this is the sentence that is very troubling. "The case demonstrates, at least symbolically, how professional methods and instruments developed to advance medical treatment were perversely misused by this defendant and others to further criminal ends."

And the reason we are concerned is that there is only

one other person alive in this conspiracy, and only one other person waiting for trial who is licensed to use a stethoscope in this case, and that's my client.

THE COURT: Mr. Durkin, that is misleading of the Court's statement. The methods are used by Dr. Ajemian and his co-conspirators, meaning those who were convicted, who have pled guilty to being part of that conspiracy, as involved in Dr. Ajemian's actions and Dr. Ajemian himself. That statement is not intended to refer to anybody else but Dr. Ajemian and the codefendants who have pled guilty of the acts of which he was found guilty and sentenced. If that is of any comfort to your client, that is what the Court intended. I did not intend to make any reference to any other defendant not found guilty at this point.

MR. DURKIN: I understand that. I am not suggesting that you would have intentionally done that. Your reputation precedes you, and I know you wouldn't have intentionally done that. But under 28 U.S.C. 455(a), the issue is appearance of impropriety. I'm sorry. Not impropriety. The appearance of a lack of impartiality.

If I could give you one other instance. Again, I am not saying that you would have done it intentionally. I wouldn't suggest for a minute that you would have intentionally caused a problem. I think the statement speaks for itself.

THE COURT: Apparently, the first statement didn't

speak for itself because you misunderstood it.

MR. DURKIN: Perhaps I did. That's the problem with appearance of impropriety. I am not the only person that I have talked to about this who understood it that way. And that's one of the problems with the appearance of impropriety.

The second problem that has arisen is on page 5, you talk about what you call the pathological transformation of Ajemian, referring to the use of his medical skills primarily. But you say, "Through his fraudulent procedures he facilitated the conversion of many Long Island Railroad employees into convicted felons."

Now, I know you're only talking about Ajemian there.

THE COURT: Ajemian and those others who were part of the conspiracy who were convicted. Who else is there?

MR. DURKIN: I understand. The central problem that we have, and this is what I would like you to at least consider, the government posited a theory of its evidence that the physicians were the gatekeepers or the persons responsible for this entire conspiracy. We believe, and I believe that's what caused the friction at the sentencing, I believe that in Dr. Ajemian's counsel's pleading, which challenged the version of the offense that was incorporated into the presentence report based on the government's presentation, he challenged this issue of gatekeeping. And I understand the dynamics of a courtroom and the dynamics of pleadings, but the challenge he

made over this gatekeeper theory is essentially the legal and factual challenge we are going to be making in this entire case. We are confident that when you hear all this evidence, you will not be able to make the same findings.

THE COURT: Mr. Durkin, it is not I who is going to make the finding; it is the jury.

MR. DURKIN: You also have to sentence. There are two prongs to my concern. It's not just the trial. You are the sentencing judge. And you have, to me, and I again say this respectfully, taken a position that these doctors were responsible --

THE COURT: No, Mr. Durkin, one doctor, Dr. Ajemian. He was the only one who pled guilty, and there is a public record that he committed the acts charged by the government. Based on that public record, public admission, public conviction, the Court made findings about the extent of his culpability for the purposes of sentencing. It does not refer to anybody else.

MR. DURKIN: I understand what you're saying. But I believe if you read this entire statement in context, I believe a reasonable person could come to the same interpretation we come to, which therefore causes the appearance of impropriety. I keep using impropriety. I don't mean that. I believe the statute reads lack of impartiality.

I am happy to file the motion, but I didn't want to

file a motion like that without first addressing it with you orally. I would ask you to consider disqualifying yourself.

THE COURT: Thank you.

Anything else?

MR. DURKIN: No.

THE COURT: Mr. Durkin, I think I understand what you're saying, in the same way that I hope you understand what I was saying. I do not believe that you have given any sufficient reasonable grounds for the concern that you and your client have. I will not consider any such motion. If you make such a motion, I will deny it.

MR. DURKIN: Thank you.

THE COURT: Anything else from any other defendant?

MR. SCARING: I have something. There has been an enormous amount of publicity in this case, press conferences, press releases. Every time a defendant takes a plea, there is so much out in the public today about the Long Island Railroad employees and the alleged scheme that I am concerned that we need to address that in some way different than we would otherwise in the selection process.

I was wondering if your Honor would consider, on the question of publicity, individually voir diring the jurors. Again, enormous publicity in this case, including The New York Times front page stories on this, repetitive press releases, repetitive press conferences. The public is easily swayed, but

it is not so easy to then dissuade them. And as your Honor knows, the normal voir dire process goes along rather quickly and many jurors have things they want to say, but because they are in a crowd or in a group, they simply don't say it.

So given the length of this trial, since it's going to be a long trial, if we were to spend an extra day to make sure that the publicity has not impacted these jurors, I think that would be an extra day well spent, and I request that your Honor consider that. I would be happy to speak with the government and try to come up with some process, and co-counsel, that might effectuate that in a reasonable way.

THE COURT: All right. Thank you.

I think your concern is certainly not unreasonable and you're free to discuss the matter with the government, and if you can come up with any additional assurances that will give you greater comfort about the issue of publicity there should be no problem. As you undoubtedly know, part of the standard voir dire of the court is to ask parties whether they have had any prior knowledge about any of the circumstances of the case, whether they have read anything about it, and if so, the court typically asks for more detail. So that is already built into our standard voir dire. Look at those questions in our standard voir dire and if there is some supplementary question that you believe might give you greater comfort, by all means the court will consider that.

That said, I also have faith that there are enough people out there in a huge jury pool, as this one is likely to generate, who either may have heard about the case and could still satisfy the court and the parties that they can be impartial, or, as high profile cases such as the OJ and the World Trade Center bombers will attest, people could be found to have never heard of the matter.

Mr. Durkin.

MR. DURKIN: Along the lines of jury selection, we have drafted a request for a jury questionnaire and a jury questionnaire itself. I am going to circulate that to our co-counsel over the weekend, and I will get a draft to the government so that they can look at it, but I think that would be appropriate as well.

THE COURT: Thank you.

Mr. Weddle.

MR. WEDDLE: Thank you, your Honor.

I don't have as much experience as many of the lawyers in the room, but I have done some very lengthy trials in this courthouse and based on my experience, I find questionnaires to be a waste of time. My experience is that they are lengthy, they are lengthy to prepare and to distribute, they take an extraordinary amount of time to review, and most of the answers are somewhat cursory or ambiguous, and therefore the court is just left with following up on every question anyway.

So I am obviously happy to look at whatever counsel submits, but I think that this is not the most well-known case in this courthouse. This courthouse deals with cases that are in the news on a daily basis. It's a big city. Typically we don't have any trouble finding juries with a regular voir dire that can sit fairly and impartially even in cases that have been in the news. I have total confidence that we will be able to do the same thing here with a standard voir dire. I don't want to add days or more than a week to the trial time just to copy and distribute and consider questionnaires that ultimately are not particularly helpful. I also don't want to add days and days to the trial time in order to do a person-by-person voir dire when we are talking about a -- I think the biggest concern in this case is a four week trial in the middle of the summer. A lot of people are going to have conflicts in terms of their availability and hardship. That's going to be the biggest concern. So we are going to be dealing with a relatively large venire, not because of some notoriety of the case, but just because it's a lengthy case. It's not the most lengthy, but it's not a tiny trial and it's the middle of the summer. So I don't want to bog that process down with some kind of specialized procedure because a typical voir dire normally talks about whether people have read about the case in the news and that kind of questioning can be done just as easily in this case.

So that's my sort of generalized view on questionnaires, and I think this case doesn't present any kind of specialized issues with respect to finding a fair jury. Obviously, we who are involved in the case have a bias in favor of noticing and reading articles about the case, but I think your average potential juror in New York City may have paid no attention to this case at all.

I would also like to say a little bit about the sentencing issue that Mr. Durkin raised. Obviously, I completely disagree with him. Your Honor was conducting a sentencing and your Honor was giving reasons for the sentence that you imposed, and they were obviously thoughtfully considered and it was a public proceeding. The document that your Honor filed are the same words that your Honor spoke publicly in this courtroom for anyone to write down. It's obviously hard to write it down as quickly as our court reporters are able to do so, and I imagine that the interest of the public were served by your Honor filing that document. Nothing that your Honor said prejudges the case.

I do think that the defendants here, like Dr. Ajemian, are planning to attempt to blame the victim. I told your Honor that we are working on in limine motions. This is part of our in limine motion. The case law that we found is very clear that negligence of a victim in a fraud case is not a defense.

So the arguments that Mr. Durkin claims your Honor has

prejudged I think, first of all, I am confident that your Honor hasn't prejudged them. If Mr. Durkin comes up with some case law or some law or some arguments that are different from what your Honor has heard before, and that your Honor finds to be convincing, I am confident that your Honor is going to do what your Honor thinks is right at the time.

Obviously, I think that the presentation that he made today is woefully inadequate to justify any serious look at disqualification, but who knows what he is going to put in his papers. He is a very able lawyer, and he may come up with something if he decides to file such a motion and decides that it is worth the time. But I think there is nothing unusual about a judge sentencing one defendant when other defendants, who were previously charged together with that defendant, have yet to go to trial. It's standard. Your Honor is obliged to explain your sentence. Your sentence is pronounced in the context of a defendant having allocuted under oath, admitted his guilt, admitted that his guilt swept across hundreds of people, and that those people were able-bodied and capable of working.

Dr. Lesniewski has not done that, and obviously he is going to present his defense, and I have every confidence that your Honor is going to preside over the case fairly, and I have every confidence every reasonable observer would have no question about that issue. Which isn't to say that Dr.

Lesniewski is going to be able to present any supposed defense that he wants. The trial is going to be conducted according to the rules of evidence, and if he wants to say that the victim of this case, the victim of fraud, the charged fraud should have done more to stop him from committing the fraud, it's simply not a defense and it shouldn't be admitted under the rules of evidence.

So this is an issue that we plan to brief for your Honor, but I think that some of the issues that came up at the sentencing, namely, Dr. Ajemian's proposition that other people were to blame for his crime, and that your Honor should therefore give him a reduced sentence, your Honor dealt with that argument. That's a different argument from arguments that may be presented at trial. And those arguments that someone else should have prevented me from committing this crime or seen through my lies, those arguments are simply not a defense to fraud, and therefore those should be dealt with as well, but in a different way. Now we are talking about guilt or innocence as opposed to culpability and sentencing factors.

So I think that we are obviously getting close to trial, and when we do that all lawyers focus very hard on the case and think of arguments that they perhaps hadn't thought about before, and I imagine that there are going to be more between now and July 15, but that's part of getting ready for a trial, and we will be ready and we think that certain of these

issues, we are obviously going to brief the issue, and I am sure the defense will oppose those motions, but I think that some of these issues are really not part of the trial and that it's entirely routine and any reasonable observer of the court would understand that it's routine that one defendant has pled guilty and has to be sentenced before another defendant, who has pled not guilty and is presumed innocent, is exercising his or her rights to a jury trial, and that that jury trial is going to be conducted fairly.

THE COURT: Thank you. Let me come back to the points concerning questionnaires.

Acknowledging that this is a relatively long trial, I do not believe that questionnaires are necessary. I agree with the government that they tend to lengthen the selection process and sometimes are not entirely helpful. I also agree that this in the scheme of things is not the enormously high profile case that would require questionnaires in advance.

I also take into account that the venire for trials in this district are not limited to Manhattan. This district goes into the Bronx, Westchester, and all of the lower counties in Downstate New York, extending as far as Dutchess and Sullivan. It's inconceivable that everybody in those counties will necessarily have read about circumstances in Long Island Railroad in New York, in Manhattan, that might sway them in some way. Perhaps some, but I think that with such a large

geographic scope to draw from, I am confident that we should be able to find sufficient people who will not raise those kinds of concerns.

I am also concerned, again, that we have only four weeks in the middle of the summer and that is going to make it difficult to select a jury. So we don't want to do anything that might lengthen the process. In fact, as I was thinking about it just a minute ago, it occurred to me that one thing we might want to consider is to begin the jury selection process the week before July 15 so that July 15 is the day when we actually begin the presentation of the trial rather than begin on July 15 with selection of the jury. We might want to look at calendars to see whether everybody might be available for jury selection the week before July 15.

Yes, Mr. Durkin.

MR. DURKIN: Can I address that?

THE COURT: Yes.

MR. DURKIN: That would be very difficult for me since I am from out of town and it would add considerable cost to my client. I also had planned on using that week to prepare for trial. But you have correctly raised the issue of the summertime and four weeks. If I hear the government correctly, they are only talking about four weeks for their case. I have told the government that I am pretty sure that we are going to use an expert. They were referring to us as the one they

shared information with because I told them I needed that in order to make a decision about using our own expert. We have consulted with an expert, but I have not given any notice yet that we intend to use him.

I am concerned that this could very easily be a six week trial. I would prefer to try the case this summer because I have it scheduled for that, but I am equally concerned, I don't want a four week limitation on this to cause problems for everyone else, the Court, the jurors. I am not as familiar with New York. I know it is problematic in Chicago to try cases and get jurors that will sit that length of time. So I think that might be fair to discuss. I frankly have been telling everybody I thought the government's case was two to three weeks. I am not faulting them. That may well be what it is. But if it is, I think we can easily have two weeks of a defense case. And if you're concerned about four weeks, I guess what I am saying, as much as it would be my preference for my own convenience to try it this summer, I would certainly move the date rather than have to worry about having to get locked in if that's going to be a problem. I defer to you. I don't know enough about New York.

THE COURT: It's not terribly different from what you indicate is your experience in Chicago, and I am sure that that's the case throughout the country. People make commitments for summer vacations and the deeper it gets into

July and August, the more difficult it gets for people to be available for four to six weeks. So that to me compels trying to do everything conceivable to limit the time rather than to find ways or possibilities for expanding it.

So let me come back to the question of whether we can do jury selection the week before even if we have to do it in the matter of two days during that week.

Mr. Durkin, I recognize that you need defense counsel time to prepare, but we are still several weeks away, and if we were to allocate, let's say, two days during the course of that prior week for jury selection, it might be well spent.

MR. JACKSON: Good afternoon again. I presently do not have the ability to do that. I certainly am on focus to begin July 15. It was always my anticipation that beginning on that date, that was the day that jury selection would proceed.

Additionally, I don't know that I will call an expert. I am certainly contemplating and speaking about that and certainly during the course of trial it's entirely possible. I like everyone else have my own vacation plans. That I will forgo in light of this trial, but I am concerned that to try to get everything done within that four week time frame it could cause some difficulty. Again, as to my own personal issues, I can scrap my vacation, but I don't have the ability, based on my scheduling, to begin jury selection a week prior to July 15, and to the extent that it may expand into August it could

become problematic.

THE COURT: Anyone else who may have difficulty with jury selection the week before?

MR. SCARING: I would propose, if no one has any objection, that we try the case in the fall. That makes it a lot easier.

THE COURT: The fall of what year?

MR. SCARING: This year.

THE COURT: Not possible.

MR. SCARING: I think that it shrinks the jury pool also when you start out saying to them you're going to give up your whole summer. A lot of people will pretty much bail out right away.

THE COURT: I recognize that as a major concern, but we are going to have to deal with it somehow.

Anyone else?

MR. RYAN: Joseph Ryan for Joe Rutigliano.

The question of peremptory challenges, I am going to ask that your Honor consider our application for additional challenges. Based on the colloquy I have heard here in this courtroom, there are going to be conflicting views of the evidence on the defense team. We do not plan to claim that the railroad retirement court was negligent. To the contrary, they were very diligent and honest and they did the best they could applying the law as they understood it at the time. So that

gives you a little idea of the necessity for different considerations of each individual defendant and the desirability of giving each defendant an additional peremptory challenge during the jury selection process.

MR. DURKIN: I'm sorry. I talked to Dr. Lesniewski and I thought there was a conflict. I can come if we did it the 11th and the 12th. Are we set for the 15th or the 16th? I have the 16th in my book.

THE COURT: It's Monday.

MR. DURKIN: Are we starting on the 15th?

THE COURT: Yes. Juries usually are fresh on Mondays. By the middle of the week we are getting a lot of, I don't want to call them rejects but --

MR. DURKIN: That's what they are, as we all know.

THE COURT: People on the rebound.

It's possible also that one thing we can do, which I have done in the past, is ask the jury room to request a venire to begin on Wednesday, let's say, so that they will be fresh on Wednesday rather than on Monday.

MR. DURKIN: So you would contemplate then the 10th?

THE COURT: Yes. Wednesday or Thursday. My experience, even with this kind of difficult case, is that we may be able to conclude jury selection in about two days. If we start on Wednesday or even Thursday, we may be able to do it. But at least one counsel indicated he is not available at

all that week.

MR. JACKSON: I don't even know that I will be in the state of New York that week. I have scheduled my summer based upon the representation that we are moving forward on the 15th. So today, to be talking about beginning the week before, it just doesn't comport with -- again, to the extent that we go after and anything happens in August and we are here till September, those are the breaks. But with regard to prior to that, I am completely prepared to begin on July 15, but I can't at this date make a commitment to start jury selection the week prior to that.

THE COURT: I recognize that this has been somewhat sprung upon you, but I ask that you examine your schedule, your options, and the feasibility and inform us as to whether there is any prospect at all that you might be able to adjust your schedule to make it possible. If you cannot in good faith, then we will have to begin on the 15th of July and do the best we can. How much time do you think you might need to review your situation and get back to the Court and the government?

MR. JACKSON: I can tell you today, I more than likely will be in Atlanta, Georgia at that time, and if I am not, I think the obligations I will have will be in New York. So I can't commit in good faith to beginning jury selection the week before.

THE COURT: You are referring to what you can't commit

at this point, but you haven't said what you might be able to do if you think about it and consult and examine your options. Take a couple of days and let us know.

Let's say by Tuesday of next week?

MR. JACKSON: Yes, Judge.

THE COURT: Get in touch with the Court and the government by letter indicating what your circumstances are, and if they haven't changed, then we will proceed on the 15th. If they have, then we will all appreciate it and ensure that instead of being here the last week in August, we might be able to finish within the four weeks that we are talking about.

Anything else from anyone else?

Thank you. Have a good day and a good weekend.

MR. DURKIN: If I could, I know you said you were going to deny the motion. I always have something to say. Can I have at least leave to file something further to simply make sure that I have covered the record completely?

THE COURT: If you want to file something for the record, you certainly are free to do that.

MR. DURKIN: Thank you.

I don't agree with what Mr. Weddle said, nor do I want to leave you with the impression that our defense is going to be that the railroad retirement court was negligent. It was a mess, but that's not the defense.

THE COURT: The defense is whatever it turns out to

be. This is not the forum in which to talk about the defense.

MR. DURKIN: I am only doing it because Mr. Weddle was suggesting it. Trust me, that's not the defense.

THE COURT: Thank you.

(Adjourned)